

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ATARI INTERACTIVE, INC.,

Plaintiff,

v.

REDBUBBLE, INC.,

Defendant.

Case No. 18-cv-03451-JST

**PRETRIAL ORDER RE “TYPE OF  
GOOD” JURY INSTRUCTION**

The parties currently dispute the appropriate jury instruction on “type of good” for purposes of calculating trademark infringement damages. *See* ECF No. 166 at 63; ECF No. 171 at 75.

The Court will not give either of the parties’ proposed instructions in its current form. The Court concludes that whether two items constitute the same or different type of goods is an issue of fact for the jury to be determined by the “functional purpose test” set forth in *Gucci Am., Inc. v. MyReplicaHandbag.com*, No. 07 CIV. 2438 (JGK), 2008 WL 512789, at \*4 (S.D.N.Y. Feb. 26, 2008); *see also Church & Dwight Co. v. Kaloti Enterprises of Michigan, L.L.C.*, 697 F. Supp. 2d 287, 292 (E.D.N.Y. 2009), *vacated in part on different grounds*, No. 07 CIV. 0612 BMC, 2011 WL 4529605 (E.D.N.Y. Sept. 28, 2011); *Rolls-Royce PLC v. Rolls-Royce USA, Inc.*, 688 F. Supp. 2d 150, 159 (E.D.N.Y. 2010).

The parties are ordered to submit a proposed or competing instructions on this subject by October 15, 2021 and to indicate whether and where other amendments to their proposed

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instructions are required to harmonize the instructions.

**IT IS SO ORDERED.**

Dated: October 12, 2021

  
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JON S. TIGAR  
United States District Judge

United States District Court  
Northern District of California